Supreme Court, U.S.
FILED

No. 98-9 81442 MAR 10 1999

IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

October Term, 1998

In Re Clarence Murphy, ***Petitioner, Acting as an Adjoining Property Owner of a Twelve-plex Apartment Known as 2655 Tech Drive, Bettendorf, Iowa (Within 200 feet of the Planned Parenthood Property), Who Made a Successful Statutory Protest Against the Planned Parenthood Application for a Zone Change to C-5, Which Was Denied by the Bettendorf City Council in a Quasi-Judicial Order Which Is Now Final, in Which Petitioner Has a Vested Property Right (Zoning Interest) under the Iowa Constitution; and Claims a Right to a Rule Nisi , Pursuant to (1) an 11th Amendment Jurisdictional Bar; (2) Huffman v. Pursue, Ltd. and the Huffman and Rooker-Feldman Abstention Doctrines; and (3) the Res Judicata and Stare Decisis Doctrines with Respect to the Issues Raised in Planned Parenthood's Subsequent Civil Rights Action in the U.S. District Court under 42 U.S.C. §1983.***

On Petition for an Original Writ of Mandamus to the
U.S. District Court, Southern District of Iowa, Davenport Division
and the Honorable Charles R. Wolle, Judge of the
U.S. District Court, Southern District of Iowa, Davenport Division

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**PETITION TO INTERVENE
PURSUANT TO F.R.C.P. 24(a)(2), AND
PETITION FOR WRIT OF MANDAMUS,
PURSUANT TO 28 U.S.C. §1651(A).**

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QUESTIONS PRESENTED

I

Whether the ***Huffman*** **Abstention Doctrine**, involving important state interests, expressed by this Court in ***Huffman v. Pursue Ltd.***, 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), reh. den., 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969, and its progeny: ***Middlesex Ethics Comm. v. Garden State Bar Assn.***, 457 U.S. 423, 73 L.Ed.2d 116, 102 S.Ct. 2515 (1982), ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984) and ***University of Tennessee v. Elliott***, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986); and by the 8TH Circuit progeny: ***Plough v. West Des Moines Community School District***, 70 F.3d 512 (CA 8TH 1995); is "jurisdictional"; that is, whether its function is to resolve a conflict involving "concurrent federal jurisdiction" by determining whether the federal court has federal jurisdiction under **Article 3, §2**, or the state court has exclusive jurisdiction under the **11TH Amendment**?

II

Whether Petitioner Clarence Murphy, as an adjoining property owner of a twelve-plex apartment known as 2655 Tech Drive, Bettendorf, Iowa (within 200 feet of the Planned Parenthood property), who made a successful statutory protest against the Planned Parenthood Application for a Zone Change to C-5, which was denied by the Bettendorf City Council in a quasi-judicial City Council Order on March 19, 1996, which is now final and vests in Clarence Murphy important state property (zoning) interests (rights) under the **Iowa State Constitution**, and ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983); has standing to intervene as of right pursuant to **F.R.C.P. 24(a)(2)**, where Petitioner Murphy contends that, because of the successful statutory "protest", the **Doctrines of *Huffman* Abstention**, ***Rooker-Feldman*** **Abstention**, **Res Judicata** and **Stare Decisis** also apply in favor of Petitioner Murphy's cause of action against Planned Parenthood

(independent of whether they apply as to the City of Bettendorf); and Petitioner Murphy's ***Intervention Motion*** was exercised immediately after he learned that the Bettendorf City Attorney would not appeal the adverse judgment because of the impending threat of an assessment of substantial attorney's fees by U.S. District Judge Wolle under **42 U.S.C. §1988**?

III

Whether the **Res Judicata Doctrine** applied by the 8TH Circuit Court of Appeals in the ***Plough*** case, supra, is controlling precedent as to Petitioner Clarence Murphy's cause of action under the **Doctrine of Stare Decisis**, and whether the refusal of the U.S. District Court to apply the **Stare Decisis Doctrine** to to Petitioner Murphy's cause of action constitutes "conduct prejudicial to the administration of justice that brings the judicial office into disrepute", in violation of the Canons on Ethics which govern and control the performance of federal judges?

IV

Whether this Court will apply ***Banks v. Chicago Grain Trimmers Asso.***, 390 U.S. 459, 20 L.Ed.2d 30, 88 S.Ct. 1140 (1968) as precedent and grant Petitioner Clarence Murphy the right to intervene under the mandatory provisions of **F.R.C.P. 24(a)(2)**, for the purpose of obtaining a Writ of Mandamus pursuant to this Court's original jurisdiction and **28 U.S.C. §1651(a)**, where the record shows, that Petitioner Murphy, acting in defense of his own property rights, under the Iowa Constitution and as a private attorney general on behalf of the general public (the State of Iowa, its cities and the City of Bettendorf, a Home Rule City) has established that Planned Parenthood's filing of a civil rights action in the U.S. District Court below violates the **11TH Amendment** and this Court's ***Huffman*** **Abstention Doctrine** and the **Res Judicata Doctrine**; and Petitioner Murphy as a non-party has "standing" to intervene under this Court's test in ***Baker v. Carr***, 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962):

> ". . . Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that the concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions?",

and has been manifestly deprived of his right to mandatorily intervene by both the U.S. District Court and the 8TH Circuit Court of Appeals below, who have refused to address or permit oral argument on the question of lack of subject matter jurisdiction under **Article 3 §2 of the U.S. Constitution**, which those Courts are required to treat and resolve as their first (in this case, their only) order of business, pursuant to this Court's clear and emphatic instructions in ***Steel Co. v. Citizens for a Better Environment***, ___ U.S. ___, 140 L.Ed.2d 210, ___ S.Ct. ___ (March 4, 1998)?

V

Whether, under the **11TH Amendment** and ***Allen v. McCurry***, 449 U.S. 90, 60 L.Ed. 2d 308, 101 S.Ct. 441 (1980) and ***Parratt v. Taylor***, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981), Planned Parenthood can state a Civil Rights cause of action under **42 U.S.C. §1983** and **42 U.S.C. §1988** to support **Article 3, §2** federal jurisdiction where it has an equivalent state court remedy by way of an appeal to the Iowa State Courts from a city council's denial of a zone change application, but no right under Iowa law to attorney fees pursuant to such an appeal, except where a Constitutional injury is pleaded and proven?

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PETITION TO INTERVENE, PURSUANT TO F.R.C.P. 24(a)(2), AND PETITION FOR WRIT OF MANDAMUS, PURSUANT TO 28 U.S.C. §1651(A).

Petitioner Clarence Murphy (hereinafter "Petitioner Murphy" and "Petitioner") moves this Court to intervene in Case No. 1222 [1/], and also moves, pursuant to **28 U.S.C. §1651(a)**, and **Rule 20(1) of the Supreme Court Rules** as revised in 1997, that an order and **Rule Nisi** be entered and issued directing the U.S. District Court, Southern District of Iowa, Davenport Division, and the Honorable Charles R. Wolle, District Judge of the U.S. District Court, Southern District of Iowa, Davenport Division, to show cause why a writ of mandamus should not be entered in accordance with the prayer of this Petition (which alleges that the U.S. District Court lacks **Article 3, §2** subject matter jurisdiction), and why the Petitioner should not have such other and further relief pursuant to the **11TH Amendment**; ***Huffman v. Pursue Ltd.***, 420 U.S. 592 (1975) and the ***Huffman*** **Abstention Doctrine**, as may be just and proper.

OPINIONS AND ORDERS

A copy of the Orders of the U.S. District Court, the 8TH Circuit Court of Appeals below, and the U.S. Supreme Court appears at **Appendix A** to this ***Petition for Writ of Mandamus***.

STATEMENT OF THE CASE

Planned Parenthood wishes to construct an abortion

[1/] This ***Petition for Writ of Mandamus*** is ancillary to the ***Petition for Writ of Certiorari*** in ***In Re Clarence Murphy***, No. 98-1221 and ***Clarence Murphy v. Planned Parenthood of Greater Iowa, Inc.***, No. 98-1222. Petitioner Murphy requests this Court to take Judicial Notice of both ***Petitions*** and consider the merits of the three cases in tandem.

clinic in Bettendorf, Iowa. The **Bettendorf Zoning Ordinance** allows abortion clinics on property in a C-5 Zone.

Had Planned Parenthood purchased a C-5 Zoned property, it would not have had a zoning problem. Instead, it chose a property in a PUD Zone within 200 feet of three relatively new residential apartment complexes and submitted an application for approval of a C-5 Zoning Ordinance.

Petitioner Murphy and two other adjacent apartment owners within 200 feet of the Planned Parenthood property made a successful statutory protest (**20% Rule**) against the zone change, pursuant to **Bettendorf Zoning Code, §24.2 and §24.4** (see copy at **Appendix C**), which precluded the Bettendorf City Council from adopting a C-5 Zoning Ordinance unless the City Council voted 6-1 in favor of the Zoning Ordinance. The City Council aligned itself with the protesters and on March 19, 1996 voted 5-1 to reject the C-5 Zoning Ordinance. That quasi-judicial order was not appealed and is now final and **Res Judicata** under Iowa Law.

Zoning Rights are "Vested Rights" under Iowa Law and the **Iowa Constitution**. The 8TH Circuit Court of Appeals has so held in its decision in ***Nemmers v. City of Dubuque, Iowa***, 716 F.2d 1194 (1983).

Under Iowa case law, a city council's action on a zone change request is broadly defined to be a "judicial function" which can be appealed by writ of certiorari to the Iowa District Courts, see ***Montgomery v. Bremer County Board of Supervisors***, 299 N.W.2d 687 at 692 (Iowa Supreme Court 1980). If an appeal is not filed within 30 days, the city council's actions become final, in which case, under the **11TH Amendment** and ***Huffman v. Pursue Ltd.***, 420 U.S. 592 at 606, fn. 18 and 19 and the progeny of ***Huffman***, and ***Plough v. West Des Moines Community School District***, 70 F.3d 512 at 516-517 [CA 8TH 1995]), the city council's quasi-judicial order is both final and **Res Judicata**.

On March 21, 1997, one year and two days after the City Council's rejection of the C-5 Zoning Ordinance, Planned Parenthood filed a Civil Rights Action under **42 U.S.C. §1983**

in the U.S. District Court, pleading what is, in essence, an appeal from the March 19, 1996 decision of the Bettendorf City Council which considered essentially the same issues and facts and denied the application for the C-5 Zoning Ordinance in a quasi-judicial order which was not appealed to the Iowa District Court. The federal complaint: (1) did not name the three adjacent apartment owners who made the successful statutory protest as defendants; and (2) demanded attorney's fees under **42 U.S.C. §1988**.

The City of Bettendorf filed a Summary Judgment Motion, pursuant to the ***Huffman*** **Abstention Doctrine** and the **Res Judicata Doctrine** which Judge Wolle denied.

Upon conclusion of the federal trial, Judge Wolle entered a judgment which purported to rezone the property from P.U.D. to C-5 Zoning and awarded attorney's fees to Planned Parenthood under **42 U.S.C. §1988** which would not have been available had an appeal been taken to the Iowa District Court following the denial of the C-5 Zoning Ordinance.

Petitioner Murphy moved to intervene in the U.S. District Court immediately after the City of Bettendorf ("parens patriae") announced its decision not to appeal, for the purpose of appealing U.S. District Judge Wolle's Judgement on **11TH Amendment**, the ***Huffman*** **Abstention Doctrine** and other jurisdictional grounds, including his denial of the City's Summary Judgment Motion on its plea of **Res Judicata**.

Judge Wolle: (1) ruled "cursorily" on Petitioner Murphy's "extensive" pleadings that the Intervention Motion was "untimely"; (2) refused to address the merits of Petitioner's right to mandatory intervention; and the **11TH Amendment**; **Res Judicata**, and other Jurisdictional claims raised at the time of Petitioner's ***Intervention Motion***, and (3) refused to hear oral argument on the intervention and jurisdictional claims.

In the Court of Appeals below, Petitioner Murphy sought judicial relief from Judge Wolle's arrogation of Federal Judicial Power in two forms: by the filing of a direct appeal and the filing of an original action (a verified complaint pursuant to a Petition for Writ of Mandamus) in the 8TH Circuit Court of

Appeals, pursuant to **28 U.S.C. §1651(a)**.

In a highly unorthodox ruling, the Court treated the ***Appellant's Opening Brief*** on the direct appeal and the original petition for a prerogative writ of mandamus, as though they had been consolidated and, in a brief single order, denied the petition for Writ of Mandamus without an opinion, and summarily affirmed Judge Wolle's Judgment, also without opinion. The Court of Appeals also denied a petition for rehearing and suggestion of a hearing en banc in each of the two cases.

Petitioner Murphy contends in this ***Petition for Writ of Mandamus***, pursuant to this Court's original jurisdiction: (1) that Planned Parenthood has not stated, and cannot state a **42 U.S.C. §1983** cause of action because it had an adequate remedy under Iowa procedure of judicial review by the Iowa District Court (see ***Allen v. McCurry***, 449 U.S. 90 at 100 [1980] and ***Parratt v. Taylor***, 451 U.S. 527 [1981] at **Point IX**, page 26, infra), and (2) that it is not entitled to attorney's fees under **42 U.S.C. §1988** because Iowa and other state courts do not customarily award attorney's fees in litigation involving an appeal from a denial of a C-5 zoning ordinance and application of the **Bettendorf "Protest" Ordinance**; and (3) where, as here, a separate **42 U.S.C. §1983** cause of action is pleaded and relied upon, it must be tried in the Iowa District Court because of the **11TH Amendment** bar, which has been pleaded; and (4) in any event, Judge Wolle's Judgment must be reversed because, at this state of the proceedings, the **11TH Amendment**, the ***Huffman*** **Abstention Doctrine** and the **Doctrines** of **Res Judicata** and **Stare Decisis** control the disposition of this case and mandate that the Federal Judgment must be vacated for lack of **Article 3, §2** subject matter jurisdiction.

Petitioner Murphy contends he is entitled to a **Rule Nisi** pursuant to **28 U.S.C. §1651(a)** correcting the egregious refusal of both Courts to address the issue of "lack of **Article 3, §2** subject matter jurisdiction" under his **11TH Amendment** claim. See ***Steel Co. v. Citizens for a Better Environment***, 140 L.Ed.2d 210 (March 4, 1998) (duty to address the question of subject matter jurisdiction as the first order of business, and on

its own motion, if the parties to the lawsuit do not bring the matter to the trial court's attention); ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.***, 121 L.Ed.2d 605 at 610, 506 U.S. 139 (1993) (creating a new Rule of Court re the issue "lack of subject matter jurisdiction"); ***Wisconsin Dept. of Corrections v. Schacht***, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378, No. 97-461 (June 22, 1998) (Associate Justice Kennedy's concurring opinion re the issue of "lack of subject matter jurisdiction"). See ***Kerr v. U.S. Dist. Ct.***, 426 U.S. 394 (1976); ***Will v. U.S.***, 389 U.S. 90 (1967); and **Supreme Court Practice**, *7TH Ed.*, ***Stern, Gressman, Shapiro, Geller,*** **©1993** at page 495.

RE INTERVENTION: THIS COURT HAS, ON SEVERAL OCCASIONS, PERMITTED INTERVENTION, AND THEREAFTER GRANTED PLENARY REVIEW TO A PERSON WHO WAS NOT A PARTY.

In circumstances identical to the instant case, in ***Banks v. Chicago Grain Trimmers Asso.***, 390 U.S. 459 (1968), this Court granted plenary review to a person who was not a party and who had been denied intervention in the Courts below. See, generally, **Supreme Court Practice**, *7TH Ed.*, by ***Stern, Gressman, Shapiro and Geller,*** **©1993**, at pages 871-876.

RE JURISDICTION

Petitioner Murphy alleges and contends: (1) that the writ of mandamus will be in aid of the Court's appellate jurisdiction; (2) that exceptional circumstances warrant the exercise of the Court's discretionary powers at this time; and (3) that adequate relief cannot be obtained in any other forum or from any other court for the following reasons:

REASONS FOR GRANTING THE WRIT

I The Writ of Mandamus Will Be in Aid of this Court's Appellate Jurisdiction.

I(A) **First Claim**: U.S. District Judge Charles R. Wolle has egregiously (knowingly and without judicial explanation) refused to acknowledge the finality of the quasi-judicial order of the Bettendorf City Council which, in acting in a quasi-judicial capacity, denied the Planned Parenthood Zone Change Application; and has egregiously (knowingly and without judicial explanation) refused to acknowledge Petitioner Murphy's vested property interest arising out of the City Council's quasi-judicial order and "protest" statute, as a zoning property right under the Iowa State Constitution and ***Nemmers v. City of Dubuque***, Iowa, 716 F.2d 1194 (1983). Petitioner Murphy's real property interests entitle Petitioner to intervene pursuant to the mandatory provisions of **F.R.C.P. 24(a)(2)** for the purpose of appealing Judge Wolle's wrongful assumption of subject matter jurisdiction and denial of Petitioner's lawful right under Iowa law to "protest" and prevent the zone change needed to allow an abortion clinic within 200 feet of his residential apartment complex. Heretofore, such wrongful federal interference with the implementation of **Bettendorf Zoning Ordinance §24.2** and **§24.4** and **11TH Amendment** rights and state judicial orders and their equivalent, have evoked this Court's mandatory "appellate" jurisdiction to correct federal interference by a single U.S. District Judge in important state interests which are of a constitutional dimension and raise a substantial federal question. See the three-judge requirements of **28 U.S.C. §2281** (repealed in 1976) as applied in ***Huffman v. Pursue Ltd.***, supra, which is discussed in this ***Petition*** at **Point IV** on page 10, et seq..

I(B) **Second Claim**: Both U.S. District Judge Charles R. Wolle and the panel of Judges for the 8TH Circuit have, egregiously (knowingly and without judicial explanation)

refused to apply the ***Huffman*** **Abstention Doctrine** and the jurisdictional rules re the **11TH Amendment** rights of the State of Iowa and the **Doctrine of Res Judicata** as established by this Court in ***Huffman v. Pursue Ltd.***, supra, and clarified in the following ***Huffman v. Pursue Ltd.*** progeny: ***Middlesex Ethics Comm. v. Garden State Bar Assn.***, 457 U.S. 423 (1982); ***Migra v. Warren City School Dist. Bd. of Ed.***, 465 U.S. 75 (1984); ***University of Tennessee v. Elliott***, 478 U.S. 788 (1986); and as applied by the U.S. Court of Appeals for the 8TH Circuit after such clarification in ***Plough v. West Des Moines Community School District***, 70 F.3d 512 (CA 8TH 1995).

I(C) Third Claim: Both the U.S. District Court and the U.S. Court of Appeals for the 8TH Circuit have, egregiously (knowingly and without judicial explanation) refused to apply this Court's recent decision in ***Steel Co. v. Citizens for a Better Environment***, 140 L.Ed.2d 210 (March 4, 1998), which required that a federal court examine and address, as its first order of business, whether or not that court has jurisdiction of the subject matter which is before them.

I(D) Fourth Claim: Petitioner Murphy's cause of action presents a simple zoning case involving Petitioner's lawful right arising out **Bettendorf Zoning "Protest" Ordinance, §24.2** and **§24.4**, which allows adjacent property owners within 200 feet of a proposed zoning change to protest any zone change application.

The abortion facility cannot be constructed on the Planned Parenthood property without considering the underlying Iowa State "Protest" Statute which authorizes such protests and creates such property interests. Under the **11TH Amendment** and the ***Huffman***, ***Watson v. Buck***, and ***Rooker-Feldman*** **Abstention Doctrines**, a federal court does not have **Article 3, §2** subject matter jurisdiction of such claims.

Both federal courts know and realize that to address Petitioner Murphy's timely ***Petition to Intervene*** and lawful claims will require that all of Judge Wolle's Judgments be

reviewed and reversed.

The wrongful actions of the Federal Courts will permit an abortion facility to be constructed within 200 feet of his residential apartments, notwithstanding Petitioner's successful "protest" and **11TH Amendment** rights under the **Bettendorf Zoning Ordinance, §24.2** and **§24.4**, which now prohibit such construction under Iowa law (the City Council's quasi-judicial Order, dated March 19,1996, which was not appealed).

Counsel of Record respectfully submits that such "in your face" decisions re "subject matter jurisdiction" by a single U.S. District Court Judge and by a U.S. Court of Appeals, without an explanatory judicial opinion, require the "equivalent" of mandatory review by writ of mandamus (rather than writ of certiorari) because such judicial decisions violate this Court's precedential decisions which require the lower federal courts to address the issue of "subject matter jurisdiction" in an explanatory opinion whenever and wherever that issue is raised.

1(E) Fifth Claim: Because it had an adequate state court remedy (appeal by Writ of Certiorari to the Iowa District Court) Planned Parenthood has not, and cannot state a cause of action under **42 U.S.C. §1983**, nor is it entitled to attorney fees under **42 U.S.C. §1988**.

II Exceptional Circumstances Warrant the Exercise of this Court's Discretionary Powers at this Time.

Counsel of Record filed a timely ***Notice of Appeal*** and ***Appellant's Opening Brief*** in support of an appeal from such wrongful trial court ruling, together with an original ***Petition for Writ of Mandamus*** alleging lack of **Article 3, §2** subject matter jurisdiction under the **11TH Amendment of the Federal Constitution** as a second and independent case in the U.S. Court of Appeals for the 8TH Circuit.

In a highly unorthodox procedural ruling, the U.S. Court of Appeals, without an explanatory judicial opinion, treated ***Appellant's Opening Brief*** and original ***Petition for a Writ of***

Mandamus, alleging lack of **Article 3, §2** subject matter jurisdiction under the **11TH Amendment**, as if that appellate case and original writ proceeding had been consolidated and, without an explanatory judicial opinion, summarily dismissed Petitioner Murphy's appeal and concomitantly denied Petitioner Murphy's original Petition for Writ of Mandamus.

III Adequate Relief Cannot Be Obtained in Any Other Forum or from Any Other Court for the Following Reasons:

"Adequate Relief" in the above context means "giving notice to the U.S. District Courts and the U.S. Courts of Appeals in the 11 Circuits, that the ***Huffman*** **Abstention Doctrine** is "Jurisdictional" and that the Planned Parenthood Civil Rights Action must be dismissed on those grounds where the ***Huffman*** test has not and cannot be met. This requires a reexamination of this Court's opinion and decision in ***Huffman v. Pursue, Ltd.***, supra.

III(A) The Refusal of a Majority of Federal Courts to Acknowledge the "Jurisdictional" Aspect of the *Huffman* Abstention Doctrine Manifests a Need for Re-Examination of the *Huffman* Cases.

Petitioner Murphy contends that the rule of law re lack of **Article 3, §2** subject matter jurisdiction under this Court's opinion in ***Huffman v. Pursue, Ltd.***, supra, has existed for the past 24 years as an **11TH Amendment** right; yet few of the federal courts consider themselves bound thereby.

When faced with Petitioner's lawful right to intervene as an indispensable party and to contest the U.S. District Court's actions (requiring the construction of an abortion clinic within 200 feet of his apartment complex) pursuant to Petitioner's claim of lack of **Article 3, §2** subject matter jurisdiction under the **11TH Amendment**, the ***Huffman*** and ***Rooker-Feldman*** **Abstention Doctrines**, the **Res Judicata Doctrine** and the

Stare Decisis Doctrine, both the U.S. District Court and the U.S. Court of Appeals for the 8TH Circuit dismissed such claims without an explanatory judicial opinion, in utter disregard of this Court's repeated admonitions that a federal court must rule on the jurisdictional issue as its first order of business.

Petitioner Murphy submits that, in the light of what is said hereafter at **Point IV** about the background of the rule of law expressed in ***Huffman v. Pursue, Ltd.***, supra, and the great harm which has resulted from this Court's having refused to "squarely" address the **11TH Amendment** jurisdictional aspect of the ***Huffman*** case, this Court should use this Petition to clarify the rule of law on "lack of **Article 3, §2** subject matter jurisdiction" in ***Huffman*** by making explicit that which is implicit (i.e., said by indirection and inference) by either a **Rule Nisi**, or by noting jurisdiction on the Questions Presented and setting those issues for oral argument and decision by the Court.

IV A Re-Examination of the *Huffman* Cases.

25 years ago (May 1973), the substantial federal question which controls this case; namely, the conflict between the subject matter jurisdiction of federal courts under the **14TH Amendment (42 U.S.C. §1983)** and **Article 3, §2 of the U.S. Constitution**; and the subject matter jurisdiction of state courts under the **10TH and 11TH Amendments to the U.S. Constitution**, was squarely before this Court in two forms: (1) in ***Lawrence S. Huffman v. U.S. District Court for the Northern District of Ohio, Western Division***, No. 72-1613 Misc., being a Motion for Leave to file a Petition for Writ of Mandamus and Petition for a Writ of Mandamus as to this Court's original jurisdiction pursuant to **28 U.S.C. 1651(a)**; and (2) in ***Lawrence S. Huffman v. Pursue, Ltd.***, No. 73-296, which is now reported as 420 U.S. 592, supra, being an appeal from an adverse judgment of a three judge court with respect to the constitutionality of the Ohio Public Nuisance Statute as then required by this Court's mandatory appellate jurisdiction under

28 U.S.C. §2281 (repealed in 1976) [2/].

Counsel of Record for Petitioner Murphy in this ***Petition for Writ of Mandamus*** was also the Counsel of Record for Allen County, Ohio Prosecutor Huffman (hereinafter "Huffman") in Huffman's two cases in 1975. A duplicate copy of the Jurisdictional Statement and the Petition for Rehearing in ***Huffman v. Pursue, Ltd.***, No. 73-296 and the Motion for Leave to File a Petition for Writ of Mandamus and Petition for Writ of Mandamus in ***Huffman v. U.S. District Court***, No. 72-1613 Misc. is being filed with this Court as **Exhibits 1A, 1B and 1C** to this ***Petition*** with a request that this Court take Judicial Notice of such pleadings.

IV(A) The Critical Status of the Ohio State Court's Jurisdiction and Huffman's Dilemma.

The final judgment which closed the Cinema I Theater in the Ohio public nuisance case was filed on November 30, 1972. The attorneys for the theater transferred the ownership to a newly formed Corporation and on the next day filed a civil rights action in the U.S. District Court attacking the constitutionality of the Ohio Public Nuisance Statutes (which required review by a three judge federal court).

On the date the action was filed, the Common Pleas Court in Lima Ohio still had statutory jurisdiction for 30 days for the purpose of considering post trial motions, the filing of a notice of appeal and motions for attorneys' fees, etc. The High Court did not consider this critical fact in its opinion.

In the two ***Huffman*** cases which were before this Court, Huffman made a determined effort to focus the Court's attention on "Subject Matter Jurisdiction" which, according to this Court's prior precedents was and is always to be the first order of business (see ***Steel Co. v. Citizens for a Better Environment***, 140 L.Ed.2d 210 [March 4, 1998]) and properly belonged in the

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[2/] **28 U.S.C. §1615(a)** and **28 U.S.C. §2281** are set forth at **Appendix C** to this ***Petition***.

Ohio State Court System. This tactic was absolutely essential to the prosecutor's success, so that he could get a definitive appellate ruling on the "closure" procedure by the Ohio Supreme Court in this ***Huffman*** "test case" (which ruling would also be available as "precedent" in other State Public Nuisance Abatement cases which were then being developed using the civil abatement process, and the Time and Motion Study and Film Continuity Study as real evidence for the prosecution, and the potential of an award of attorney's fees to cover the cost of abatement and closure of a moral public nuisance).

IV(B) Abdication of this Court's Primary Duty re Jurisdiction in *Huffman*– Ohio's Concern re Moral Depravity, an Important State Interest under the 10TH and 11TH Amendments.

Unfortunately, this Court avoided answering the "subject matter jurisdiction" question which was squarely raised in the (original) Petition for Leave of Court to File a Petition for Writ of Mandamus after Solicitor General Robert Bork informed the Court that the "Jurisdictional Statement" on the mandatory appeal had been filed in the interim and that the "jurisdiction" question "could" (not "would") be addressed in that case when this Court heard that appeal pursuant to its mandatory appellate jurisdiction of the three Judge Court Judgment.

In 1973, the National need for a decision upholding the subject matter jurisdiction of a state court on important state matters such as the abatement of moral public nuisances pursuant to Chapter 3767 of the Ohio Revised Codes and the **10TH and 11TH Amendments** was abundantly clear. The "moral depravity" which then was being exhibited by the escalating pornography industry and porn industry films, such as the film "Deep Throat", (which "glorified" sodomy per o.s. [oral sodomy]) were appearing as the regular fare at the Cinema I Theater in Lima, Ohio (see **Exhibits 1A, and 1B** to this ***Petition***) and on motion picture screens in each of the 50 States. The federal courts were wrongfully being employed by the

porno industry to interfere with the **10TH and 11TH Amendment** efforts of law enforcement to produce real evidence of such hard-core films in the state courtrooms using the search warrant process and the subpoena duces tecum process. See, for example, ***Hicks v. Miranda***, 422 U.S. 322 (1975) as an example of the intrusive litigation faced by law enforcement.

In May of 1973, the depravity that files like "Deep Throat" represented in its graphic depictions of "oral sodomy" (o.s.) was uniformly recognized as being contrary to the "Natural Law" and Judaeo Christian moral standards, and acknowledged as such by an overwhelming majority of the legal profession. 23 years earlier (1950), Professor Rollin M. Perkins, now Connell Professor of Law Emeritus, U.C.L.A. Professor Emeritus, University of Hastings College of Law had instructed Counsel of Record herein (as a first year law student in Prof. Perkins' criminal law class at U.C.L.A.), and later published in his definitive text on the Criminal Law, that the Common Law in the United States with respect to this subject (oral sodomy) and "public morals" was clearly defined and well documented. [3/]

IV(C) The Prosecuting Attorney's Interests Versus This Court's Interests in *Huffman*.

In both cases, Huffman asked that the U.S. District Court Order be annulled and that the case be remanded to the Ohio Judicial System (so that a final appellate decision could be

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[3/] See text of ***Perkins*** on **Criminal Law** (at pages 465-466), *the Foundation Law Press*, 3RD Ed., (first published in 1955) at **Appendix B** to this ***Petition***, which reads in part:

> " The ancient city of Sodom, reputedly destroyed because of its unspeakable vices, is the source from which the word 'sodomy' is derived. The offense was regarded with such abhorrence in the early days that Blackstone literally refused to name it, referring to it only as 'the infamous *crime against nature*.'[25] 4 Bl.Comm. *215. " (Our Emphasis.)

achieved). [4]

The "Questions Presented" at pages 5-9 and the "Statement of Facts" at pages 9-28 of the Petition in No. 72-1613 Misc. was purposely comprehensive [5] and tailored to the Prosecutor's special needs so that anyone in the appellate chain who later undertook a study of those documents would immediately recognize the jurisdictional issue being raised and the need for an issuance of a **Rule Nisi** re jurisdiction.

This Court was thinking of the Federal Judiciary's own National needs, and was not (primarily) interested in the practical aspects of the case in relation to the State of Ohio.

At Oral Argument, Justice Stewart asked if Ohio would be satisfied if the ***Younger*** **Rule** in criminal cases were extended to civil proceedings. Prosecutor Huffman answered "No", in that, under this Court's own precedents, it must first address the question of "subject matter jurisdiction"– i.e., whether the case was properly before the Court– realizing that the State of Ohio had a very real need for an Ohio Appellate Ruling by the Ohio Supreme Court, and the U.S. District Court had interfered with the jurisdiction of the State of Ohio Judicial System, as to an important State Interest.

Counsel of Record recalls that, during oral argument, with knowledge of what was happening in "society" (in the "real world", the State Courts were being ham-strung by "technical" procedural decisions in their attempts to introduce the "prints" of hard-core pornographic films like "Deep Throat" in evidence before the State Courts on the merits) this Counsel stated, as his opinion, that the federal courts' ruling in the ***Huffman*** case was underwriting "cocksucking and whore mongering"– language

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[4] The prayers in the appeal in ***Huffman v. Pursue, Ltd.***, No. 72-296 and in the Petition for a Writ of Mandamus in No. 72-1613 Misc. are set forth at **Appendix D** to this ***Petition***.

[5] See, in particular, Petitioner Murphy's **Exhibit 1C** to this ***Petition*** (at "Appendix C", pages C-7 through C-10) the pleading by reference of the time/motion studies of the films named, at paragraph 7(j) and 10(c) of the Complaint to abate the Cinema I Theater as a public nuisance.

never before used by this Counsel in his professional career, or in conversation. This Counsel had determined that he would make the statement if such a statement became necessary. It was necessary, but proved to be ineffective. A majority of the Court was determined to extend the ***Younger*** **Rule** to civil cases, and would say or do no more.

Unfortunately, the fractured nature of the Court in 1975 prevented the Justices from coming together on the **11TH Amendment** issue. Instead of remanding the case to the Ohio Judicial System for further proceedings, the majority of Justices complied with their **duty** by addressing the jurisdictional issue obliquely in a technical sense and formulated the **"*Huffman* Abstention Doctrine"** (as a proper response to the rudimentary rule of law that a federal court has jurisdiction to determine jurisdiction). Proof of the correctness of this "jurisdictional" analysis can be found in the last paragraph of the Court's Opinion in ***Huffman v. Pursue, Ltd.***, supra, reading:

> " We therefore think that this case is appropriate for remand so that the District Court may consider whether irreparable injury can be shown in light of 'Without a Stitch,' and if so, whether that injury is of such a nature that the District Court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind. The judgment of the District Court is vacated and the cause is remanded for further proceedings consistent with this opinion. (Our emphasis.)

The opinion failed to instruct that the real issue before the High Court was "which of the two courts had subject matter jurisdiction" and that an **11TH Amendment** violation was at risk.

IV(D) The Battle was Won, but the "War" was Lost. This Court Can, and must Correct That Defect.

That Huffman had prevailed on his appeal was no great

victory. The "battle" was won, but the war was lost. Huffman acknowledged that reality by filing a Petition for Rehearing (see **Exhibit 1B** to this ***Petition***), which was summarily denied. The case was not remanded back to the Ohio Appellate Courts for their consideration, as requested by the State of Ohio in its Appeal, and the "closure" issue was never resolved. ***Pursue, Ltd.*** refused to litigate further and disappeared.

Counsel of Record respectfully submits that, in view of the above history, the ***Huffman*** **Abstention Doctrine** as it is presently being administered is wrong-headed. It was formulated as a jurisdictional rule to separate **Article 3, §2** jurisdiction from **11TH Amendment** jurisdiction, and should have been applied by the U.S. District Court. However, during the past 24 years this Court has never come together and stated that background fact clearly (as a fiat) in any of the many opinions on Abstention.

This Court can and should correct that defect in this case upon the facts set forth in this ***Petition*** by issuing a **Rule Nisi**, ordering U.S. District Judge Charles R. Wolle to vacate his judgment in the trial court for lack of subject matter jurisdiction under the **11TH Amendment**, the ***Huffman*** **Abstention Doctrine** and its progeny: ***Middlesex***, supra, ***Migra***, supra, ***University of Tennessee***, supra, and ***Plough***, supra; and under the ***Rooker-Feldman*** **Abstention Doctrine**, the **Res Judicata Doctrine** and the **Stare Decisis Doctrine** of this Court.

V The Federal Court's Fundamental Error: Ignoring the "Protest" Statute. The Federal Court Does Not Have and Cannot Acquire Personal Jurisdiction of the Parties Necessary to Acquire Article 3, §2 Subject Matter Jurisdiction (Petitioner Murphy and the Two Other "Protesters")

In Petitioner Murphy's case, both the U.S. District Court and the Court of Appeals for the 8TH Circuit resolved the problem by simply ignoring the **Iowa "Protest" Statute** which gave Petitioner the right as a real property owner to oppose a

change of zoning within 200 feet of his residential apartment complex, and thus oppose the building of Planned Parenthood's Abortion facility. The deliberate silence and refusal of both the U.S. District Court and the U.S. Court of Appeals for the 8TH Circuit to address that issue is plainly wrong. It is tantamount to striking the **Iowa "Protest" Statute** and is a denial of due process of law, where this is done by refusing to hear oral argument or write an explanatory judicial opinion to explain what it has done [6].

Planned Parenthood would prefer to have its alleged cause of action heard as a civil rights action in the U.S. District Court by Judge Charles R. Wolle, and not as a civil zoning case in the Iowa District Court by an Iowa District Judge. However, Planned Parenthood does not, perforce, have that option.

First of all, Petitioner Murphy does not want to have the incidents of his "Iowa" real property (zoning) rights heard as a federal matter in a civil rights action in the U.S. District Court, nor does he want to hire an attorney to perform services in the federal court which are the responsibility of the City of Bettendorf in its role as "**parens patriae**". Rightfully or wrongfully, he is satisfied from the objective facts as summarized hereinafter at **Points VI** and **VII**, that Judge Wolle has a mind-set which favors Planned Parenthood. Petitioner therefore relies upon his personal right as a citizen of Iowa to demand that the incidents of his Iowa citizenship and real property ownership be adjudicated in the Iowa District Court as required by the **11TH Amendment**, and that they not be adjudicated in the U.S. District Court.

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[6] Although this Court's mandatory appellate jurisdiction pursuant to **28 U.S.C. §2281** was repealed in 1976, its moral responsibility to grant relief in cases like this remains, pursuant to Chief Justice Burger's promise to the U.S. Congress to hear such cases under its certiorari jurisdiction, if such a case did arise. See **28 U.S.C. §2281** at **Appendix C** to this ***Petition*** and **Supreme Court Practice**, *5TH Ed., Stern and Gressman*, **© 1978** at **§2.14 "Appeal Jurisdiction Over Three-Judge District Courts– History, Interpretation and Demise"**, pages 98-111.

In other words, Petitioner Murphy wants the red letter of the law (**11TH Amendment**) to be enforced against Planned Parenthood. Since Murphy is bound by the **11TH Amendment**, and cannot file a zoning lawsuit in the federal court against the City of Bettendorf, Iowa, a **Home Rule** City, which acts in the stead of the State, then Planned Parenthood should not be allowed to do so either.

Petitioner Murphy cannot be made a defendant in a federal civil rights action because he is not a state "actor". Murphy's appearance in ***Clarence Murphy v. Planned Parenthood of Greater Iowa, Inc.***, No. 98-1222 and ***In Re Clarence Murphy***, No. 98-1221, was a special appearance for the purpose of objecting to the **Article 3, §2** subject matter jurisdiction of the Federal Civil Rights action.

The record discloses that the Federal District Court lacks personal jurisdiction over Petitioner Murphy, who is known to possess a lawful property right with respect to the C-5 Zoning disposition and who therefore would be a necessary party in any federal action involving a zoning classification of the Planned Parenthood property.

VI The Importance and Complexity of the 11TH Amendment Challenge.

Because the City Council's determination of fact is a quasi-judicial act, per se, the **11TH Amendment** challenge is a critical factor. Under the **11TH Amendment**, judicial and quasi-judicial decisions on important state matters are to be tried in the state courts and are excluded from the **Article 3, §2** subject matter jurisdiction of the Federal Courts ("The Judicial Power of the United States shall not be construed to extend to . . ."). Although the **11TH Amendment** right is jurisdictional and is never "waived"; realistically speaking, it may be lost if the "claim is not persistently pursued to its ultimate conclusion.

A lawsuit involving an important state matter and an **11TH Amendment** issue will be within the concurrent subject matter jurisdiction of the federal district courts if the **11TH**

Amendment privilege is not claimed and persistently pursued. See ***Wisconsin Dept. of Corrections v. Schacht***, supra. One must use the privilege (pursue the claim) or lose it [7].

A federal trial judge with an inflexible mindset and the "power" to assess substantial attorney's fees under **42 U.S.C. §1988** which are not available in Iowa courts in an appeal from the determination of a city council on a C-5 zoning ordinance involving a zoning "protest", can defeat a litigant by ignoring the **11TH Amendment** challenge with the expectation that the laws of probability will prevail and the **11TH Amendment** claim will eventually "evaporate". It is this facet of the **11TH Amendment** issue which makes the solution to this jurisdictional problem so elusive and so necessary at this time.

If the constitutional issue as to subject matter jurisdiction cannot be resolved at the outset, incalculable harm to the

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[7] In this regard, Counsel of Record requests this Court to take judicial notice of one historical account of this problem as described in his ***Petition for a Writ of Mandamus and/or Prohibition, etc.***, in ***In Re State of Iowa, acting by and through Pottawattamie County Attorney Richard D. Crowl, Jr.***, No. 98-1565 SIDM, in the U.S. Court of Appeal for the 8TH Circuit. A copy of the Pottawattamie County petition is attached as "Exhibit A" to **Exhibit 2** to this ***Petition***. That petition was filed in the 8TH Circuit on February 26, 1998 and similarly was denied without opinion on March 11, 1998. Unfortunately, a political decision prevented the efforts of the Counsel of Record to take an appeal to the U.S. Supreme Court of the 8TH Circuit's refusal to act on the Petition and render a decision on the Jurisdictional question. See the concurring opinion of Associate Justice Kennedy in ***Wisconsin Dept. of Corrections v. Schacht***, on writ of certiorari to the U.S. Court of Appeals for the 7TH Circuit, No. 97-461, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378 (June 22, 1998). Associate Justice Kennedy's concurring opinion points out the advantage of focusing on the "lack of subject matter jurisdiction" approach to the **11TH Amendment** problem. Petitioner submits that if this Court grants the Writ in this case and adopts a "use it (the peremptory writ) or lose it (**11TH Amendment** defense)" rule and authorizes the use of an original writ of mandamus to perfect a plea of lack of subject matter jurisdiction under an **11TH Amendment** claim, as it appears to have done in ***Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.***, 506 U.S. 139 (1993), a good part of the problem on subject matter jurisdiction will be solved.

individual states may result. That "state" right may never be addressed, and may be forever lost [8].

In this case, there is also a need for a remedy as to the appellate rights of Petitioner Murphy which were abandoned by the "parens patria" City of Bettendorf, under pressure from the U.S. District Court in relation to the attorney's fees which were wrongfully being assessed under **42 U.S.C. §1988** in as much as the State court does not authorize attorney's fees in an ordinary zoning case. See **Point IX** at page 26, infra.

VII The Wrongful Bias and Pressure Exercised by Judge Wolle Is a Matter of Public Record.

The wrongful bias of U.S. District Judge Wolle is evidenced in his contradictory pre-trial and post-trial rulings, which have placed him in a "bear trap".

In his pre-trial Order of December 8, 1997, denying the application of the **Doctrine of Res Judicata** which Bettendorf

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[8] See, in this regard the problem involved in ***In Re State of Iowa, acting by and through Pottawattamie County Attorney Richard D. Crowl, Jr., etc.***, supra, at **footnote** 7 on page 19 of this ***Petition for Writ of Mandamus***.

See, also, the copy of the Pottawattamie County ***Petition for Writ of Mandamus*** which is attached as "Exhibit A" to **Exhibit 2** to this ***Petition*** at pages 22 and 24 (at **#16, PA 174-177, v.1**; **#20 PA 222, 232-241, v.1** and **#21 PA 244-245, v.1**). Copies of the pleadings referred to as **Docket Nos. 16, 20** and **21** are filed with this Court at **Appendix A** to Petitioner Murphy's ***Application for Leave of Court to File Petition to Intervene and Petition for Writ of Mandamus in Excess of Applicable Page Limits*** filed with this Court on January 22, 1999 in ***In Re Clarence Murphy***, Application No. A-612.

Petitioner contends that the 8TH Circuit denial of the Pottawattamie County Petition would have been reversed by this Court (had a petition for writ of certiorari been filed) as addressed by Associate Justice Breyer in that part of his majority opinion reading, "We repeat our conclusion: a state's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim.", in its June 22, 1998 decision in ***Wisconsin Dept. of Corrections v. Schacht***, 524 U.S. ___, 141 L.Ed.2d 364 at 375-378, No. 97-461.

had pleaded (see **Exhibit 2 [#32, PA 182, v.1]** to this ***Petition***), Judge Wolle, in his "overriding" desire to retain personal jurisdiction of the case for "trial", ruled (incorrectly) that Planned Parenthood need not pursue its state court remedies:

> " Defendant's first motion has no merit because plaintiff is not required to exhaust state court remedies before bringing a suit under **42 U.S.C. §1983** in federal court. See ***Edwards v. Balisock***, 117 S.Ct. 1584, 1589 (1997)." [9/] (Our emphasis.)

However, in his final Order five (5) months later, dated May 11, 1998 (see **Exhibit 5** to this ***Petition*** [at **#66, PA 542, v.3**]), in his "overriding" desire to avoid the **Stare Decisis Doctrine** that was posed by his own decision in ***Plough v. West Des Moines Community School District***, 70 F.3d 512 (CA 8TH 1995), Judge Wolle ruled the exact opposite, that is, that Planned Parenthood had no state court remedies:

> ". . . **The plaintiff here** had no full and fair opportunity to present its issues to a judicial body before filing its complaint in this court." [10/] (Our emphasis.)

Further, the wrongful pressure (threat) of substantial attorney's fees being placed upon the City of Bettendorf by Judge Wolle is reflected in his ruling on March 17, 1998, when he refused to make the defendant's different and expanded

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[9/] Judge Wolle's Order flies in the face of the **Res Judicata Doctrine** enunciated in the ***Plough***, supra, decision, in which Judge Wolle was the Trial Judge. See, also, ***Parratt v. Taylor***, supra, at **Point IX**, page 26, et seq., infra. Having abandoned its State Court remedies, Planned Parenthood now has no remaining cause of action.

[10/] This "Finding of Fact", on May 11, 1998 by U.S. District Court Judge Wolle, read in conjuncture with his December 8TH Order, is an improper reflection upon the Iowa State Judicial system and its Courts, and is not supported by the facts or the law as expressed by this Court. The State Courts are presumed to be qualified to act fairly in relation to Constitutional questions.

findings of fact and ruled (threatened) instead:

> ". . . The court may expand its findings of fact at the time it rules on the plaintiff's application for attorney fees, now scheduled to be heard by telephone conference call on Tuesday, May 24, 1998." (Our emphasis.);

see **Exhibit 4** to this ***Petition*** (at **#47, PA 377, v.2**).

Judge Wolle's refusal to recuse himself[11], his contrary (erroneous) rulings, his power as a Federal Judge to assess attorney fees, where attorney fees are not available in an Iowa state court proceeding, and his statement on the record that he might "reconsider" his "findings of fact" at the next scheduled hearing where he would be considering Planned Parenthood's application for attorney fees, pressured the City of Bettendorf into settling the attorney fees issue with Planned Parenthood before the date set by the U.S. District Court. Judge Wolle's Order, dated March 23, 1998, in its entirety reads:

> " The hearing on attorney fees scheduled to be held at 8:00 a.m. on Tuesday, March 24, 1998 is canceled. Counsel have informed the court that the issue is likely to be settled without a hearing.
>
> " By April 8, 1998, counsel shall report to the court whether or not a hearing will be needed."

see **Exhibit 4** to this ***Petition*** (at **#47, PA 378, v.2**).

Judge Wolle also refused to grant a Renewed Petition for oral argument, after Counsel of Record had developed an extensive trial court Brief on the Issues and Facts before Judge Wolle. See Petitioner Murphy's ***Renewed Request for Oral Argument Pursuant to Local Rule 14(c) and Good Cause Shown on Issue of Intervention, Res Judicata, and Lack of Subject Matter Jurisdiction*** which was filed May 22, 1998 at **Exhibit 5** to this ***Petition*** (at **#68, PA 548-551, v.3**)

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[11] A copy of the ***Motion to Recuse and Order Thereon*** is attached at **Appendix E**.

VIII The *Huffman* Abstention Doctrine Needs to Be Re-Examined: it Is Singular in Purpose and Narrow in Scope, Being Specifically Designed to Resolve the "Lady or the Tiger" Jurisdictional Dilemma (11TH Amendment or Article 3, §2 [*Ex Parte Young*] Subject Matter Jurisdiction?).

Petitioner contends that Chief Justice Rehnquist's Opinion for the Court in ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 (1975), is quite clear. **The *Huffman* Abstention Doctrine is: (1) narrow in scope, and (2) was designed to treat a specific** problem; that is, its function as an "Abstention Doctrine" is to determine which court has "subject matter jurisdiction". It was crafted by the U.S. Supreme Court in 1975 as a doctrinal solution to resolve the "Lady or the Tiger" jurisdictional dilemma a federal court faces in **42 U.S.C. §1983** cases with respect to the **14TH Amendment** claim and the conflicting **11TH Amendment** claim of Ohio Prosecuting Attorney Huffman in ***Huffman v. Pursue, Ltd.***, supra,. See ***Frank R. Stockton's*** "**The Lady or the Tiger**" (1844):

> " He could open either door he pleased. . . . If he opened the one, there came out of it a hungry tiger, the fiercest and most cruel that could be procured, which immediately sprang upon him, and tore him to pieces, as a punishment for his guilt. . . . But if the accused person opened the other door, there came forth from it a lady, the most suitable to his years and station that his Majesty could select from his fair subjects. . . . So I leave it with all of you: Which came out of the door— the lady or the tiger?"

See also, the theoretical analysis set forth in the first full paragraph on page 27.

VIII(A) "Apples" (The *Younger* Abstention Doctrine and the *Huffman* Abstention Doctrine) and "Oranges" (Other General Abstention Principles) must Be Distinguished. Although the *Younger* Abstention Doctrine and the *Huffman* Abstention Doctrine Are Solidly "Rooted" in *Watson v. Buck*, 313 U.S. 387 (1941), They Are Distinguishable from Each Other and from Other Abstention Doctrines. Their Primary Function Is to Determine Which Court Has "Subject Matter Jurisdiction".

The conflict between **Article 3, §2 (*Ex Parte Young*)** and the **11TH Amendment** subject matter jurisdiction is unrelated to other general principles of abstention. See Chief Justice Rehnquist's remarks in this regard in ***Huffman***, supra, at 420 U.S. 604-605 and the distinction drawn in the concurring opinion of the then Circuit Judge Anthony Kennedy in his argument on the bench in ***World Famous Drinking Emporium, Inc. v. City of Tempe, Arizona***, 820 F.2d 1079 at 1084 (C.A. 9TH 1987).

It is important to note that, although both the ***Younger*** **Abstention Doctrine**, ***Younger v. Harris***, 401 U.S. 37 (1971), and the ***Huffman*** **Abstention Doctrine**, ***Huffman v. Pursue Ltd.***, 420 U.S. 592 (1975) are "rooted" in ***Watson v. Buck***, 313 U.S. 387 (1941), they are separate "narrow" Rules of Law and each has its own "distinct" attributes. As such, they are different kinds of "apples".

VIII(B) *Younger* Abstention and *Huffman* Abstention Are Distinguishable.

The ***Younger*** **Abstention Doctrine** resolved a conflict between two sovereigns (Federal Judiciary and State Judiciary) in which the federal plaintiff sought to enjoin the State Sovereign pursuant to the **14TH Amendment** and **42 U.S.C. §1983** from prosecuting the plaintiff in the State Court under an allegedly unconstitutional State Statute. If the ***Younger***

Abstention (procedural) elements exist [12], the Federal Court must: (1) abstain, and (2) dismiss, unless the Court can find and determine the existence of either: (a) "extraordinary circumstances", or (b) that "the danger of irreparable injury is great and immediate", with the Burden of Proof resting on the party urging **Article 3, §2** federal jurisdiction. See ***Pennzoil Co. v. Texaco, Inc.***, 481 U.S. 1 (1987)

In the case of the ***Huffman*** **Abstention Doctrine**, the relevant elements are different. In addition to the conflict of Sovereign Powers, the relevant elements in the ***Huffman*** **Abstention Doctrine** are: State Court "Subject Matter Jurisdiction" re civil litigation under the **11TH Amendment** (Judicial Powers) and other "substantial" State Interests (Rights) (Legislative, Judicial, and Administrative) with the **11TH Amendment** being asserted as a State "Right" and defense to defeat **Article 3, §2** Federal "subject matter jurisdiction" by the existence of either: (a) a pending state judicial action, or (b) the filing of a Declaratory Judgment in the State Court which places in issue all of the state and federal constitutional issues raised in the U.S. District Court "civil rights action", under the aegis of the ***Hicks v. Miranda*** **Doctrine**, 422 U.S. 322 (1975) where: (1) the **42 U.S.C. §1983** "Civil Rights Action" which has been pleaded in the Federal Court (including money damages) [13] can also be pleaded and heard in the pending civil action in the State Court (not available in ***Younger*** **Abstention** in criminal litigation), and (2) the additional issues as to the applicability of the anti-injunction statute, **28 U.S.C. §2283** in the light of the

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[12] In the case of ***Younger*** **Abstention**, at best, ***Quackenbush v. AllState Ins. Co.***, ___ U.S. ___, 116 S.Ct. 1710 (1996) presents a substantial Federal Question. See, for example, ***Martinez v. Newport Beach City***, 125 F.3d 777 at 781, fn. 4 and 5 (9TH Cir. 1997) and ***Deakins v. Monaghan***, 484 U.S. 193 (1988).

[13] In the case of ***Huffman*** **Abstention**, ***Quackenbush***, supra, is irrelevant. All constitutional issues, including money damages can be heard in the State Court.

asserted trial facts, where the State has challenged both the concurrent (**Article 3, §2**) federal jurisdiction and the ***Ex parte Young***, supra, "fiction" and requires that all issues (including all federal constitutional issues and the ***Ex parte Young*** "fiction" and "damages") be resolved in the State Court system. See **Point IX** and ***Parratt v. Taylor***, supra, hereinafter at page 26.

If the ***Huffman* Abstention** elements exist (plus an insistent State demand that the **11TH Amendment** is not and cannot be waived and that the "substantial" state interest must be tried in the State Court) and the three part ***Huffman-Middlesex*** (457 U.S. 423 [1982]) test is satisfied, the Court must abstain and dismiss the federal action, unless the Federal District Court finds and determines: (1) the existence of "extraordinary circumstances", or (2) that "the danger of irreparable harm is great and immediate". In such a case, **Article 3, §2** federal jurisdiction does not exist in the absence of proof of extraordinary circumstances, or the dangers of irreparable harm which is great or immediate.

It must be observed and emphasized that the three part "***Middlesex***" test, in ***Middlesex County Ethics Committee v. Garden State Bar Association***, 457 U.S. 423 (1982), applies to ***Huffman*** (civil) **Abstention** cases, and is not a part of the ***Younger*** (criminal) **Abstention** doctrine (where the issue of "damages" cannot be litigated, see ***Deakins v. Monaghan***, 484 U.S. 193, 98 L.Ed.2d 529 at 540, fn. 6 [1988] and ***Lewis v. Beddingfield***, 20 F.3d 123 at 125 [C.A. 5, 1994]) although federal reported decisions often do not note this distinction.

IX Because it Had an Adequate State Court Remedy (Appeal from a Zoning Determination), Planned Parenthood Has Not, and Cannot State a Cause of Action under 42 U.S.C. §1983, Nor Is it Entitled to Attorney Fees under 42 U.S.C. §1988.

Here, ***Allen v. McCurry***, 449 U.S. 90 at 100 (1980) and ***Parratt v. Taylor***, 451 U.S. 527 (1981) act as a bar. Because there is an adequate state remedy, the federal forum is barred

from entertaining an action.

In a **42 U.S.C. §1983** civil rights action such as this, because **Article 3, §2** federal jurisdiction is dependent upon the "fiction" created in ***Ex Parte Young***, 209 U.S. 123 (1908), the jurisdiction of the federal court is terminated upon a determination that the assertion of the ***Huffman* Abstention Doctrine** is applicable, because the "fiction" of ***Ex Parte Young*** is dispelled by the assertion of a valid **11TH Amendment** claim that the state action is lawful. At that point, the federal court is under the constraint imposed by the **10TH** and **11TH Amendments** and is required to dismiss the lawsuit and the civil rights claim must be pleaded and proved in the state action.

This Court should not allow enforcement of "**Home Rule**" **11TH Amendment** rights under state zoning laws to become obfuscated by Planned Parenthood's spurious constitutional claims.

The focus of ***Parratt*** is not whether there has been an exhaustion of state remedies in order to establish the jurisdictional prerequisite; rather, ***Parratt*** deals with the definition of a constitutional deprivation [14/]. No cause of action

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[14/] Parratt dealt with a tortuous loss of property as a result of a random and unauthorized act by a state employee, which was not the result of some established state procedure. Note that in the area of land use planning, several federal court have considered the possibility that denials of zoning permits, especially at the initial state before administrative appeals, do not work constitutional deprivations, because until the state process is final (state administrative and appeals process completed), unsuccessful applicants possess at most a "unilateral expectation," which does not constitute a constitutionally protected property interest. These cases recognize that a State's interest in land use planning is considerable. See ***Albery v. Redding***, 718 F.2d 245 (7TH Cir. 1983); ***Scott v. Greenville County***, 716 F.2d 1409, 1419 (4TH Cir. 1983); ***Creative Environments, Inc. v. Estabrook***, 680 F.2d 822, 829-834 (1ST Cir. 1982), cert denied, 459 U.S. 989 (1982); ***LaSalle National Bank v. County of Lake***, 579 F.Supp. 8 (ND Ill. 1984); ***Brown v. Brienen***, 722 F.2d 360, 369 (7TH Cir. 1983) (*Plaum, J.* concurring); ***Chiplin Enterprises v. City of Lebanon***, 712 F.2d 1524, 1527 (1ST Cir. 1983); ***Deerfield Medical Center v. City of Deerfield Beach***, 661 F.2d 328, 331, n. 4 (5TH Cir. 1981). See also ***Molgaard v. Town of***

under **42 U.S.C. §1983** has or can be stated where there is an adequate state court remedy.

The ordinances in question are constitutional on their face in that they are capable of being constitutionally construed by both state administrative and judicial officials, had they been given that opportunity. While Planned Parenthood seeks to challenge the constitutionality of certain zoning ordinances, as applied, these questions could have been adequately addressed (assuming they were relevant) by the state court in reviewing the City Council's zoning denial.

Huffman* Abstention** requires that federal courts refrain from interfering with state court review of administrative application of state law, where the state has enforced its laws or has begun to enforce them. See, also, ***Ohio Civil Rights Comm'n. v. Dayton Schools, 477 U.S. 619 (1986) (the Court applied the articulation found in ***Middlesex Ethics Comm. v. Garden State Bar Assn.***, 457 U.S. 423 [1982] of ***Younger* Abstention** to ongoing state administrative proceedings, judicial or otherwise, in which important state interests are vindicated and in which the federal plaintiff would have a full and fair opportunity to litigate constitutional claims); and ***Pennzoil Co. v. Texaco, Inc.***, 481 U.S. 1 (1987) (Texaco [state defendant] did not seek available state remedies, but filed an injunctive action in federal court which sought to enjoin Pennzoil [state plaintiff] from taking action to enforce a multibillion dollar judgment that a Texas state court rendered against Texaco. The Court found that the existence of an available state forum in which Texaco could have raised its claims [which forum the court held would be considered adequate until proved otherwise] barred Texaco's federal action.)

State proceedings (not tainted by bias, bad faith or harassment) for which the state offers statutory appellate review through its courts, or otherwise, are pending for ***Huffman* Abstention** purposes from the time it is initiated, until it has completed the review process. The City of Bettendorf began

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Caledonia, (DC Wisc. 1981) 527 F.Supp. 1073, aff'd. 595 F.2d 58.

the adjudicative process of enforcing its laws when it initiated the quasi-judicial administrative zoning proceeding, which resulted in a determination by the City Council that the zone change should not be granted. The availability of state judicial review created an adjudicative continuum which existed at the time Planned Parenthood filed its federal complaint. ***Alleghany Corp. v. Haase***, 708 F.Supp. 1507 (W.D.Wis. 1989) at 1515-1519. The same ***Huffman* Abstention** concerns that apply to ongoing administrative proceedings apply to ended administrative proceedings, where state court review is available. ***Alleghany Corp. v. Haase***, supra, at 1515. See also ***Sun Refining & Marketing Co. v. Brennan***, 921 F.2d 635 (6TH Cir. 1990) at 639-640, citing ***World Famous Drinking Emporium, etc.***, 820 F.2d 1079 (9th Cir. 1987) (Court found federal plaintiff clearly had unexhausted state appellate remedies where it had an opportunity to appeal decision of Board of Building appeals through state judicial system, holding "there was therefore an on-going state proceeding in this case" at the time the federal complaint was filed and that the ***Huffman* Abstention Doctrine** was applicable).

In this case, Planned Parenthood's filing of a civil rights action in the U.S. District Court is a clear example of an unauthorized collateral federal appeal in violation of the ***Rooker-Feldman* Abstention Doctrine** which substantially disrupts and interferes with state appellate procedures which are en train.[15/]

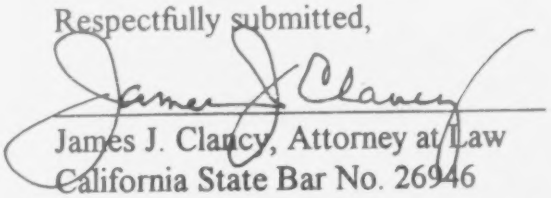
[15/] The same jurisdictional issue was before the United States Supreme Court in ***Huffman***, supra. There the Lucas County Common Pleas Court had entered a final injunction of "closure" on a hard-core pornographic theater, after holding that the autoptical evidence (film and time and motion studies) established that a public nuisance existed at that theater under the **Ohio Red Light Abatement Statute**. The entry of that final injunction started the running of the statutory time for filing an appeal to the Court of Appeal and Ohio Supreme Court. Because the federal trial court wrongfully assumed jurisdiction and granted injunctive relief, the important adjudication of "closure" was prevented from being adjudicated by the Appellate Courts in the Ohio Judicial System.

CONCLUSION

Accordingly, this Court should grant the relief as requested hereinabove, and by **Rule Nisi** order that the ***Petition to Intervene*** pursuant to **F.R.C.P. 24(a)(2)** be granted, and that the ***Petition for Writ of Mandamus***, requiring that Judge Wolle's Judgment be vacated for lack of subject matter jurisdiction, pursuant to the **11TH Amendment**, the ***Huffman*** **Abstention Doctrine**, the ***Rooker-Feldman*** **Abstention Doctrine**, the **Res Judicata Doctrine** and the **Stare Decisis Doctrine**, be granted or that the U.S. District Court show cause why such relief should not be granted.

March 4, 1999

Respectfully submitted,

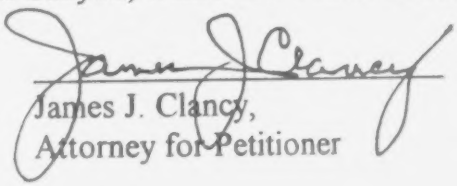


James J. Clancy, Attorney at Law
California State Bar No. 26946
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352-2221
(818) 352-2069 Fax (818) 352-6549
for Petitioner Clarence Murphy.

DECLARATION

I, James J. Clancy, declare that I have read the above ***Petition for Writ of Mandamus***, that I am familiar with the contents thereof and that the same are true and correct as I verily believe.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on March 4, 1999 at 9055 La Tuna Canyon Road, La Tuna Canyon, California 91352-2221.



James J. Clancy,
Attorney for Petitioner

APPENDIX A

ORDERS

ORDER OF THE U.S. DISTRICT COURT IN *PLANNED PARENTHOOD, ETC., V. CITY OF BETTENDORF, IOWA*, NO. 3-97-CV-80056, DATED DECEMBER 8, 1997., ... A-1

ORDER OF THE U.S. DISTRICT COURT IN *PLANNED PARENTHOOD, ETC., V. CITY OF BETTENDORF, IOWA*, NO. 3-97-CV-80056, DATED APRIL 21, 1998., ... A-3

ORDER OF THE U.S. DISTRICT COURT IN *PLANNED PARENTHOOD, ETC., V. CITY OF BETTENDORF, IOWA*, NO. 3-97-CV-80056, DATED MAY 11, 1998., ... A-6

ORDER OF THE U.S. DISTRICT COURT IN *PLANNED PARENTHOOD, ETC., V. CITY OF BETTENDORF, IOWA*, NO. 3-97-CV-80056, DATED JUNE 1, 1998., ... A-8

ORDER OF THE U.S. COURT OF APPEALS FOR THE 8TH CIRCUIT IN BOTH *PLANNED PARENTHOOD, ETC., APPELLEE V. CITY OF BETTENDORF, IOWA, DEFENDANT, CLARENCE MURPHY, ETC., APPELLANT.*, NO. 98-2496SID, AND *IN RE CLARENCE MURPHY, ETC.*, NO. 98-2825SID, DATED JULY 23, 1998., ... A-9

ORDER OF THE U.S. COURT OF APPEALS FOR THE 8TH CIRCUIT IN *IN RE CLARENCE MURPHY, ETC.*, NO. 98-2825SID, DATED OCTOBER 2, 1998., ... A-11

ORDER OF THE U.S. COURT OF APPEALS FOR THE 8TH CIRCUIT IN *PLANNED PARENTHOOD, ETC., APPELLEE V. CITY OF BETTENDORF, IOWA, DEFENDANT, CLARENCE MURPHY, ETC., APPELLANT.*, NO. 98-2496SID, DATED OCTOBER 7, 1998., A-12

NOTICE OF *ORDER* ENTERED BY U.S. SUPREME COURT ASSOCIATE JUSTICE CLARENCE THOMAS, IN *IN RE CLARENCE MURPHY, ETC.*, APPLICATION NO. A-501, DATED DECEMBER 21, 1998., ... A-13

NOTICE OF *ORDER* ENTERED BY U.S. SUPREME COURT ASSOCIATE JUSTICE CLARENCE THOMAS, IN *CLARENCE MURPHY, PETITIONER V. PLANNED PARENTHOOD, ETC.*, APPLICATION NO. A-502, DATED DECEMBER 31, 1998., . A-15

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA
97 DEC -8 PM 2:11
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,

Plaintiff,

vs.

THE CITY OF BETTENDORF, IOWA,

Defendant.

NO. 3-97-CV-80056

ORDER

On February 6, 1996, Vision Development, Inc. petitioned defendant to rezone property owned by plaintiff. On March 19, 1996, defendant rejected the petition. In this action brought pursuant to **42 U.S.C. section 1983**, plaintiff seeks declaratory and injunctive relief. It contends defendant's actions concerning the zoning of the property violate plaintiff's property rights and the privacy rights of its patients. Before the court for ruling are defendant's two motions for partial summary judgment, motions that the court heard during a telephone conference hearing on November 26, 1997.

Defendant contends in one motion that plaintiff's suit is barred because plaintiff did not timely file a petition for writ of certiori in the Iowa State District Court.

Defendant asks the court in its second motion to conclude as a matter of law that when considering an application for approval of a PUD preliminary site plan, it is appropriate for defendant to consider the economic impact on property values of adjacent properties and the neighborhood.

Defendant's first motion has no merit because plaintiff

is not required to exhaust state court remedies before bringing a suit under **42 U.S.C. §1983** in federal court. See ***Edwards v. Balisock***, 117 S.Ct. 1584, 1589 (1997).

The court denies defendant's second motion because the Federal Rules of Civil Procedure do not authorize the court to issue advisory opinion of the kind defendant here seeks. The court will make findings of fact and conclusions of law only after both parties have presented their evidence at trial, now scheduled to be held in Davenport on January 14, 1998.

Defendant's motions for partial summary judgment are denied.

IT IS SO ORDERED.

Dated this 8TH day of December, 1997.

/s/
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA
98 APR 21 PM 2:05
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,

Plaintiff,

vs.

THE CITY OF BETTENDORF, IOWA,

Defendant.

NO. 3-97-CV-80056

ORDER

Trial in this case was held on January 20 and 21, 1998. On February 12, 1998, this court filed its declaratory judgment and decree in this case, captioned ***Findings of Fact and Conclusions of Law***. The next day the clerk of court entered judgment in favor of plaintiff and against defendant. On March 17, 1998, on motion of the defendant, the court modified several provisions of the February 12 decision and scheduled a hearing on the issue of attorney fees. Counsel then informed the court they had resolved the fee issue, so the hearing was canceled. No party has requested additional rulings.

On April 13, 1998, Clarence Murphy filed a series of motions, including a motion to intervene, a motion to dismiss this case for lack of subject matter jurisdiction, and a motion for leave to file a brief in excess of fifteen pages.

The court allows the motion to file an overlength brief.

The court denies the motion to intervene.

The court denies other motions Clarence Murphy has filed; they are moot.

Federal Rule of Civil Procedure 24 allows a party to

intervene upon "timely application" when the applicant claims an interest relating to the suit and the suit's disposition may impair the applicant's ability to protect that interest. Courts generally disfavor intervention after entry of judgment because it "tends to foster delay and to prejudice adjudication of the rights of the original parties." **6 Moore's Federal Practice, §24.24[3]** (***Matthew Bender 3d edition***). The United States Court of Appeals for the Eleventh Circuit has articulated a "timeliness analysis" in considering motions to intervene. See ***Meek v. Metropolitan Dade Co.***, 985 F.2d 1471, 1478-79 (11TH Cir. 1993) (factors to be considered include the length of time the applicant knew of his interest in the case before petitioning to intervene and the prejudice intervention would cause parties).

The court has applied those factors to applicant Murphy's application and concludes he did not timely file his motion to intervene.

In his lengthy motion and supporting memorandum, Murphy has not provided good cause why he waited until after judgment to move to intervene. He plainly had notice of the lawsuit; indeed he testified before the defendant's City Council as an owner of the property adjacent to the building site where the plaintiff Planned Parenthood intends to construct its clinic. Murphy really offers no tenable reason why he waited until after final judgment to seek to intervene in this case. Moreover, Murphy has not demonstrated that his interests would be adversely affected if his motion to intervene is denied. He has not demonstrated that the defendant failed to protect his interests satisfactorily, nor that this court lacked jurisdiction to hear and decide the issues in this lawsuit. He has cited no controlling constitutional provision, statute, or case law supporting his motion to enter this lawsuit after judgment was entered.

This motion to intervene should be viewed against the backdrop of an earlier lawsuit this plaintiff filed against the Director of the Iowa Health Department. ***Planned Parenthood of Greater Iowa v. Atchison***, 126 F.3d 1042 (8TH Cir. 1997). Murphy here even contends that the Court of Appeals

"wrongfully decided" that case, arguing the case should have been decided by Iowa and not federal courts. The United States Court of Appeals for the Eighth Circuit affirmed this court's decision that defendant Atchison, acting on behalf of the State of Iowa, had violated the United State Constitution in requiring the plaintiff to seek a certificate of need before constructing its medical facility in eastern Iowa. The plaintiff has already fought successfully to prevent the State and City of Bettendorf from preventing its construction and operation of a medical clinic. Unfair prejudice to the plaintiff would result from the late intervention and continued litigation Clarence Murphy proposes in his motion.

The motion to intervene is denied.

All other motions are denied as moot.

IT IS SO ORDERED.

Dated this 21ST day of April, 1998.

/s/

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA
98 MAY 11 PM 3:57
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,

Plaintiff,

vs.

THE CITY OF BETTENDORF, IOWA,

Defendant.

NO. 3-97-CV-80056

ORDER

On April 30, 1998 Clarence Murphy filed a motion to dismiss, a motion to reconsider findings of fact and order filed April 21, 1998, and supporting documents.

The court has considered the filings. The motions are denied for several reasons.

First, Clarence Murphy is not a party. His motion to intervene was much too late, filed after this case had been tried and concluded. Murphy presents no excuse for his tardy request.

Secondly, this court had jurisdiction of the parties and subject matter. ***Plough v. West Des Moines Community School Distr.***, 70 F.3d 512 (8TH Cir. 1995), relied on by Murphy, is inapposite. Here, unlike the ***Plough*** case, no agency like the Iowa State Board of Education made factfindings while acting in a judicial capacity. The plaintiff here had no full and fair opportunity to present its issues to a judicial body before filing its complaint in this court.

Finally, I find no merit in Murphy's request that the court apply an abstention doctrine. I previously rejected defendant's request that I abstain from hearing and deciding

issues framed by the pleadings.

Murphy's motions are denied.

IT IS SO ORDERED.

Dated this 11 day of May, 1998.

/s/

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA
98 JUN-1 PM 4:45
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,

Plaintiff,

vs.

THE CITY OF BETTENDORF, IOWA,

Defendant.

NO. 3-97-CV-80056

ORDER

On May 22, 1998, Clarence Murphy filed a document captioned "renewed request for oral argument pursuant to Local Rule 14(c) and good cause shown on issues of intervention, res judicata and lack of subject matter jurisdiction".

The request is denied.

IT IS SO ORDERED.

Dated this 1ST day of June, 1998.

/s/
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2496SID

Planned Parenthood, of Greater Iowa, Inc.,	*	
Appellee,	*	Appeal from the United States District Court for the Southern District of Iowa
v.	*	
City of Bettendorf, IA;	*	
Defendant,	*	
Clarence Murphy, Moving Party is an adjoining property owner of a twelve-plex apartment known as 2655 Tech Drive, Bettendorf, IA,	*	
Appellant	*	
No. 98-2825	*	
In Re: Clarence Murphy, Moving Party is an adjoining property owner of a twelve-plex apartment known as 2655 Tech Drive, Bettendorf, IA,	*	
Petitioner.	*	

JUDGMENT

The petition for writ of mandamus in No. 98-2825 is

denied. The judgment of the district court in No. 98-2496 is summarily affirmed.

July 23, 1998

Order Entered at the Direction of the Court

/s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2825SID

In re:	*	
	*	
Clarence Murphy, Moving Party is an adjoining property owner of a twelve-plex apartment know as 2655 Tech Drive, Bettendorf, IA,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
	*	
Petitioner.	*	
	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 2, 1998

Order Entered at the Direction of the Court

/s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-2496SID

Planned Parenthood, of Greater Iowa, Inc.,	*	
Appellee,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
v.	*	
Clarence Murphy,	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 7, 1998

Order Entered at the Direction of the Court

/s/
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

December 21, 1998

Mr. James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, CA 91352-2221

Re: In Re Clarence Murphy
Application No. A-501

Dear Mr. Clancy:

The application for an extension of time within which to file a petition for a writ of certiorari in the above entitled case has been presented to Justice Thomas, who on December 21, 1998, extended the time to and including January 28, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
By /s/
Loretta S. Ruffin
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, CA 91352-2221

Mr. William R. Stengel Jr.
305 First National Bank
100 Seventeenth Street
Rock Island, IL 61201-8751

Mr. Alan S. Gilbert
8000 Sears Tower
Chicago, IL 60606-6406

Mr. Roger K. Evans
Planned Parenthood Fed. of Am.
810 Seventh Avenue
New York, NY 10019

Clerk
United States Court of Appeals for
the Eighth Circuit
511 U.S. Court & Customs House
1114 Market Street
St. Louis, MO 63101

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

December 31, 1998

Mr. James J. Clancy
9055 La Tuna Canyon Road
La Tuna Canyon, CA 91352-2221

Re: Clarence Murphy
v. Planned Parenthood of Greater Iowa, Inc.
Application No. A-502

Dear Mr. Clancy:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on December 31, 1998, extended the time to and including January 29, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
By /s/
Loretta S. Ruffin
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

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Mr. Roger K. Evans
810 Seventh Avenue
New York, NY 10019

Clerk
United States Court of Appeals for
the Eighth Circuit
511 U.S. Court & Customs House
1114 Market Street
St. Louis, MO 63101

APPENDIX B

PAGES 465-468 OF THE TEXT OF PROFESSOR ROLLIN M. PERKINS ON CRIMINAL LAW, *THE FOUNDATION PRESS*, 3RD EDITION (FIRST COPYRIGHTED IN 1955).

(Reference: *Petition for Writ of Mandamus* at page 13)

See ***Perkins*** on **Criminal Law**, *the Foundation Law Press*, 3RD Ed., (first published in 1955) at pages 465-468, as follows:

> " The ancient city of Sodom, reputedly destroyed because of its unspeakable vices, is the source from which the word 'sodomy' is derived. The offense was regarded with such abhorrence in the early days that Blackstone literally refused to name it, referring to it only as 'the infamous *crime against nature*.'[25] " (Our Emphasis.)
>
> " 25. 4 Bl.Comm. *215.

> "This lead has frequently been followed in the statutes many of which have been used some designation in lieu of a name,[26]
>
> " **26.** Ariz.Rev.Stat. §13-1411 (1978); Idaho Code §18-6605 (1979); Tenn.Code Ann. §39-707 (1975).

> "and it has been held that in an indictment the offense may be charged as 'the abominable and detestable crime against nature.'[27]
>
> " 27. Phillips v. State, 248 Ind. 150, 222 N.E.2d 821 (1967).
>
> " In Stone v. Wainwright, 414 U.S. 21, 94 S.Ct. 190 (1973), the United States Supreme Court upheld the constitutionality of a Florida statute, couched in terms of an abominable crime against nature, against a claim of invalidity because of vagueness.
>
> " 'Willett was convicted of three counts of an Infamous Crime Against Nature.' Simpson v. State, 94 Nev. 760, 587 P.2d 1319 (1978)."

" 'There is almost complete accord among many text writers that at common law commission of the crime required penetration *per anum* and that penetration *per os* did not constitute the offense.' [28]

" 28. State v. Morrison, 25 N.J.Super. 534, 96 A.2d 723 (1958). Accord, Koontz v. People, 82 Colo. 589, 263 P.2d 19 (1927) citing many cases; People v. Dexter, 6 Mich.App. 247, 148 N.W.2d 915 (1967).

" This is the logical position since sodomy was not an offense under the common law of England and is an offense under American common law because of the early English statute which did not apply where the act is in the mouth. [29] " (Our emphasis.)

" 29. Rex v. Jacobs, 1 Russ.&Ry. 331, 168 Eng.Rep. 830 (1817). For a discussion see Spence, The Law Against Nature, 32 N.C.L.Rev. 312 (1954).

"It has not been uncommon, however, for this to be added to the offense, either by express provision of the statute [30]

" 30. E.g., Ark.Stats. §41-1813 (1977); Colo.Rev.Stat. 1973, 18-3-401(6) contained in definition of 'sexual penetration.' And see State v. Putman, 78 N.M. 552, 434 P.2d 77 (App.1967).

"or by interpretation, [31]

" 31. State v. Altwater, 29 Idaho 107, 157 P. 256 (1916); Herring v. State, 119 Ga. 709, 46 S.E. 876 (1904); State v. Dietz, 135 Mont. 496, 343 P.2d 539 (1959); State v. Fenner, 166 N.C. 247, 80 S.E. 970 (1914); Berryman v. State 283).2d 558 (Okl.Cr.1955); Blankenship v. State, 289 S.W.2d 240 (Tex.Cr.1956). And see State v. Phillips, 102 Ariz. 377, 430 P.2d 139 (1967); Hogan v. State, 84 Nev. 372, 441 P.2d 620 (1968).

"until 'nearly all states punish fellatio (oral stimulus of the male sex organ [and] cunnilingus (oral stimulus of the female sex organ)' [32]

" 32. Model Penal Code 279 (Tent. Draft No. 4, 1955)."

"in addition to anal intercourse and bestiality. Some states have gone even further, [33] . . ."

" 33. The District of Columbia statute adds '. . . who shall be convicted of having carnal copulation in an opening of the body except sexual parts with another person. . . .' D.C. Code 1973 §22-3502." (**REPEALED** May 23, 1995, two years after President William Jefferson Clinton was sworn in as President of the United States of America.)

APPENDIX C

UNITED STATES CODE:

28 U.S.C. §2281 (REPEALED IN 1976), ... C-1
28 U.S.C. §1651(a) AND (b), ... C-1

(Reference: *Petition for Writ of Mandamus* at pages 6, 10-11, and 17.)

BETTENDORF ZONING CODE:

§24.2, ... C-2
§24.4 ("PROTEST" STATUTE), ... C-2

(Reference: *Petition for Writ of Mandamus* at pages 4, 6-8, and 16-18.)

In 1973, **28 U.S.C. §2281** (repealed in 1976) read as follows:

> "**§2281. Injunction against enforcement of State statute; three judge court required**
>
> " An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U.S.C. §1651(a) and (b) reads, then and now, as follows:

> "**§1651. Writs**
>
> " (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> " (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Bettendorf Zoning Code, §24.2 and §24.4 ("Protest" Statute) read as follows:

24.2. Notice of public hearing to be conducted by the body holding the hearing and the time and place thereof shall be published at least once not less than seven (7) days prior to the date fixed for such hearing in a Scott County publication having a general circulation in the city. (Ord. 11-86, §1, 2-3-1986; Ord. 48-87, §1, 8-18-1987)

24.4. In case the commission does not approve the proposal or in case of a protest against such change signed by twenty (20) percent or more of one or more of the following groups:

(a) Property owners of the lots included in such proposed change.

(b) Property owners immediately adjacent in the rear thereof extending the depth of one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).

(c) Property owners immediately adjacent in the front thereof extending the depth of one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).

(d) Property owners immediately adjacent to any and all sides (including the front and rear sides) of the proposed change extending one lot or not to exceed two hundred (200) feet therefrom (excluding street right-of-way).

Such amendment shall not become effective except by the favorable vote of at least three-fourths (3/4) of all the members of council.

APPENDIX D

STATE OF OHIO PRAYER IN:

HUFFMAN V. PURSUE, LTD.,
NO. 72-296, ... D-1

PETITION FOR WRIT OF MANDAMUS,
NO. 72-1613 MISC., ... D-2

(Reference: *Petition for Writ of Mandamus* at page 14.)

In the appellate case in ***Huffman v. Pursue, Ltd.***, No. 72-296, supra, the State's prayer read as follows:

"

CONCLUSION

"Wherefore, appellants pray:

"(1) that the order of judgment entered on April 20, 1973 in ***Pursue Ltd. v. Lawrence S. Huffman*** CIV No. 72-432 be reversed and that said action be dismissed for failure to state a claim upon which federal relief can be based.

"(2) That ***State of Ohio ex rel. Lawrence S. Huffman v. William H. Dakota, et al.***, 72 CIV 0326 be ordered remanded back to the Court of Common Pleas of Allen County, Ohio to permit appellants to execute the final judgment of said court, entered on Nov. 30, 1972." (Our emphasis.)

"November 8, 1974 Respectfully Submitted
James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, Calif. 91352
Attorney for Appellants."

In the Petition for a Writ of Mandamus with respect to this Court's original jurisdiction in No. 72-1613 Misc., the State of Ohio asked for a **Rule Nisi**, [1] pursuant to **28 U.S.C. §1651(b)** in which the prayer read as follows:

" CONCLUSION

"Wherefore, petitioners pray:

"(1) That an order and rule be entered and issued directing the United States District Court for the Northern District of Ohio, Western Division, the Honorable Anthony J. Celebrezze. Circuit Judge, and the Honorable Don J. Young and Nicholas J. Walinski, District Judges of the United States District Court for the Northern District of Ohio, Western Division, to show cause why a Writ of Mandamus or Prohibition should not be issued, commanding them:

" (a) to expunge from the record their order of judgment entered on April 20, 1973, in ***Pursue, Ltd. v. Lawrence S. Huffman***, Civil No. 72-432, and

" (b) to remand ***State of Ohio ex rel. Lawrence S. Huffman v. William H. Dakota, et al.***, Case No. 72 CIV 0326 (removed by ***William H. Dakota, et al. v. State of Ohio ex rel. Lawrence S. Huffman***, C72-445, and ***William H. Dakota v. State ex rel. Huffman***, 73 CIV 176) and ***State of Ohio v. Robert***

---

[1] **Rule Nisi**: A rule which will become imperative and final *unless* cause be shown against it. This rule commands the party to show cause why he should not be compelled to do the act required, or why the object of the rule should not be enforced.

Smith, 73 CR 093 (Removed by ***Smith v. State of Ohio***, 73 C 180) back to the Court of Common Pleas of Allen County, Ohio." (Our emphasis.)

" 2. That petitioners have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,
James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, Calif. 91352
Attorney for Petitioners."

APPENDIX E

RE MOTION TO RECUSE JUDGE WOLLE

MOTION OF THE CITY OF BETTENDORF TO RECUSE JUDGE WOLLE IN *PLANNED PARENTHOOD, ETC. V. CITY OF BETTENDORF, ANN HUTCHINSON, MAYOR OF BETTENDORF, ETC.*, NO. 3-96-CV-80184 (RE 90 DAY MORATORIUM PERIOD), FILED DECEMBER 6, 1996., ... **E-1**

RESPONSE OF PLAINTIFF PLANNED PARENTHOOD TO MOTION OF THE CITY OF BETTENDORF TO RECUSE JUDGE WOLLE IN *PLANNED PARENTHOOD, ETC. V. CITY OF BETTENDORF, ANN HUTCHINSON, MAYOR OF BETTENDORF, ETC.*, NO. 3-96-CV-80184 (RE 90 DAY MORATORIUM PERIOD)., ... **E-3**

***ORDER* OF U.S. DISTRICT JUDGE CHARLES R. WOLLE, DENYING THE MOTION OF THE CITY OF BETTENDORF TO RECUSE JUDGE WOLLE IN *PLANNED PARENTHOOD, ETC. V. CITY OF BETTENDORF, ANN HUTCHINSON, MAYOR OF BETTENDORF, ETC.*, NO. 3-96-CV-80184 (RE 90 DAY MORATORIUM PERIOD), FILED DECEMBER 9, 1996.,** .. **E-5**

(Reference: *Petition for Writ of Mandamus* at page 22.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DAVENPORT, IOWA

96 DEC -6 PM 2:27

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Planned Parenthood of Greater Iowa, Inc.	)	
Plaintiff	)	
vs.	)	
The City of Bettendorf	)	**No. 3-96-CV-80184**
Ann Hutchinson, Mayor of Bettendorf	)	**Motion to Recuse**
Defendants	)	

COMES NOW the Defendants and move to recuse Judge Wolle from the pending lawsuit and in support whereof states:

1. That Judge Wolle forthrightly and of his own volition voluntarily disclosed to the parties that his wife had in the past made a donation to Planned Parenthood ($50.00).
2. That Judge Wolle forthrightly and of his own volition voluntarily disclosed to the parties that he had purchased books at a Planned Parenthood used book sale.
3. That in this case, involving as it does constitutional issues of women's rights and protection of the public is being extensively reported in the media.
4. That under such circumstances it behooves the parties and the Court not to have even the shadow of a doubt about impartiality of the Court.

WHEREFORE, it is prayed that Judge Wolle be recused, and the matters of this litigation be heard by another Judge of

the District.

Respectfully submitted,
City of Bettendorf
Ann Hutchinson, Mayor

/s/
Gregory S. Jager
City Attorney
1609 State Street
Bettendorf, Iowa 52722
319/344-4000

/s/
Paul L. Macek
Assistant City Attorney
111 E Third Street
Davenport, Iowa 52801
319/324-1971

Attorneys for Defendants

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

PLANNED PARENTHOOD OF GREATER IOWA, INC.,	)	
Plaintiff	)	
against	)	**No. 3-96-CV-80184**
THE CITY OF BETTENDORF, IOWA, and **ANN HUTCHINSON,** in her capacity as the Mayor of the City of Bettendorf, Iowa	)	
Defendants	)	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO RECUSE

Plaintiff responds to defendant's motion to recuse as follows:

1. Chief Justice Rhenquist has admonished that the duty of a federal judge to preside where there is no basis for disqualification is "equally as strong," as the duty to recuse where there is a basis for disqualification. ***Laird v. Tatum***, 93 S.Ct. 7, 15 (1972).

2. Plaintiff's counsel are aware of no authority, and defendants have cited none, for the proposition that a judge's patronage of a business/fund-raising event sponsored by a party forms a reasonable basis for questioning a judge's impartiality.

3. Nor are plaintiff's counsel award of authority for the proposition that spouse's charitable donations form a reasonable basis for questioning a judge's impartiality. Again, defendants cite none.

4. There is, however, authority that a judge's charitable donations to a university are not a reasonable basis for questioning his impartiality when the university is a party before the court. ***Lunde v. Helms***, 29 F.3d 367 (8TH Cir. 1994), ***Wu v. Thomas***, 996 F.2d 271 (11TH Cir 1993).

5. Accordingly, plaintiff submits that defendants' motion should be denied.

Respectfully Submitted,

William Stengel
Michele R. McCann
Coyle, Gilman, and Stengel
305 First of America Bank Bld'g.
Rock Island, Illinois 61201
(309) 788-0471

Roger K. Evans
Dara Klassel
Legal Action for Reproductive Rights
Planned Parenthood Federation of America
810 Seventh Ave.
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(212) 541-7800

Alan S. Gilbert
David E. Lieberman
Sonnenchein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606-6404
(312) 876-8000

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FILED
DES MOINES, IOWA
96 DEC-9 PM 4:59
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

PLANNED PARENTHOOD OF GREATER IOWA, INC.,

Plaintiff,

vs.

THE CITY OF BETTENDORF, IOWA, and **ANN HUTCHINSON,** in her capacity as the Mayor of the Mayor of the City of Bettendorf, Iowa,

Defendants.

NO. 3-96-CV-80184

ORDER

On this date the court held a hearing on the plaintiff's request for preliminary injunctive relief.

At the outset of the hearing, I received arguments on defendants' resisted motion to have me recuse. I denied the motion for the reasons stated on the record.

At 11:50 a.m. on Tuesday, December 10, 1996, I will hold a telephone conference with counsel to discuss scheduling of trial on the plaintiff's request for permanent injunctive relief. I will place the call to counsel.

IT IS SO ORDERED.

Dated this 9TH day of December, 1996.

/s/
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT